

ADMINISTRATIVE ORDER ON CONSENT

**CERCLA SECTION 122(h)(1) AGREEMENT
FOR RECOVERY OF PAST RESPONSE COSTS**

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**CERCLA SECTION 122(h) (1) AGREEMENT
FOR RECOVERY OF PAST RESPONSE COSTS**

IN THE MATTER OF:)	AGREEMENT FOR RECOVERY
)	OF PAST RESPONSE COSTS
Ohio Drum Superfund Site)	
Cleveland, Ohio)	U.S. EPA Region 5
)	CERCLA Docket No. _____
C. DeSantis Paint Manufacturing)	
Company, City Barrel & Drum)	
Company, Elmer Freiberg, David)	
Tvert, and Cuyahoga Chemical)	PROCEEDING UNDER SECTION
Company,)	122(h) (1) OF CERCLA
)	42 U.S.C. § 9622(h) (1)
SETTLING PARTIES.)	
)	
)	

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h) (1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 6922(h) (1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D. This authority has been redelegated by the Regional Administrator, Region 5, to the Director, Superfund Division, by Regional Delegation 14-14-D, dated May 2, 1996.

2. This Agreement is made and entered into by EPA and the C. DeSantis Paint Manufacturing Company, City Barrel & Drum Company, Elmer Freiberg, David Tvert, and Cuyahoga Chemical Company ("Settling Parties"). Each Settling Party consents to and will not contest EPA's jurisdiction to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the Ohio Drum Superfund Site ("Site") located in Cleveland, Ohio. EPA alleges that the Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604. The Ohio Drum Superfund Site was a drum reclamation

operation that cleaned out drums obtained from local businesses from 1960 until 1984. As a result of this operation, the Site became contaminated with hazardous substances, including lead, polychlorinated biphenyls, cadmium, chromium, and mercury. On June 21, 1999, an EPA contractor mobilized to the Site. From July 15 through September 15, 1999, 51 truckloads of hazardous waste were transported off-site for treatment and disposal.

5. In performing this response action, EPA incurred response costs at or in connection with the Site.

6. EPA alleges that Settling Parties are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred at or in connection with the Site.

7. EPA and Settling Parties desire to resolve Settling Parties' alleged civil liability for Past Response Costs without litigation and without the admission or adjudication of any issue of fact or law.

III. PARTIES BOUND

8. This Agreement shall be binding upon EPA and upon Settling Parties and their heirs, successors and assigns. Any change in ownership or corporate or other legal status of a Settling Party, including but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. DEFINITIONS

9. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

b. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

e. "Interest" shall mean interest at the current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

f. "Paragraph" shall mean a portion of this Agreement identified by an arabic numeral or a lower case letter.

g. "Parties" shall mean EPA and the Settling Parties.

h. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA has paid at or in connection with the Site through February 1, 2003, plus accrued Interest on all such costs through such date.

i. "Section" shall mean a portion of this Agreement identified by a roman numeral.

j. "Settling Parties" shall mean C. DeSantis Paint Manufacturing Company, City Barrel & Drum Company, Elmer Freiberg, David Tvert, and Cuyahoga Chemical Company.

k. "Site" shall mean the Ohio Drum Superfund site, encompassing approximately 7 acres, located at 3967 West 25th Street in Cleveland, Cuyahoga County, Ohio, and designated by the following property description:

PEARL ROAD LOTS

Parcel No. 1

Situated in the City of Cleveland, County of Cuyahoga and State of Ohio, and known as being part of Original Brooklyn Township Lot No. 65, and bounded and described as follows: Beginning on the southerly line of said Original Lot No. 65, at the Southeasterly corner of land conveyed to Cuyahoga county, by Deed dated May 13, 1893 and recorded in Volume 550, Page 147 of Cuyahoga County Records; thence North 7° 57' 25" East, along the Easterly line of land so conveyed to Cuyahoga County 52.986 feet; thence South 89° 48' 50" East, 744.291 feet to a point in the Easterly line of land conveyed to the Born Steel Range and Manufacturing Company, by Deed dated June 6, 1902, and recorded

in Volume 842, Page 455 of Cuyahoga County Records; thence South 17° 06' 40" West along said Easterly line of land so conveyed to the Born Steel Range and Manufacturing Company, 54.865 feet to the Southerly line of said Original Lot No. 65; thence North 89° 48' 50" West, along said Southerly line of Original Lot No. 65, 735.48 feet to the place of beginning, be the same more or less, but subject to all legal highways.

Parcel No. 2

Situated in the City of Cleveland, County of Cuyahoga and State of Ohio and known as being part of Original Brooklyn Township Lot No. 65, and bounded and described as follows: Beginning on the Southerly line of said Original Lot No. 65, at the Southerly corner of land conveyed to Cuyahoga County, by Deed dated May 13, 1893 and recorded in Volume 550, Page 147 of Cuyahoga County Records; thence North 7° 57' 25" East along the Easterly line of land so conveyed to Cuyahoga County 52.986 feet; thence South 89° 48' 50" East, 379.612 feet to a point in the center line of proposed roadway, 30 feet wide, and the principal place of beginning of the following described tract of land; thence from said principal place of beginning, continuing South 89° 48' 50" East, along the said last described course, 364.679 feet to a point in the Easterly line of land conveyed to the Born Steel Range and Manufacturing Company, by Deed dated June 6, 1902, and recorded in Volume 842, Page 455 of Cuyahoga County Records; thence North 17° 06' 40" East along said Easterly line of land so conveyed to the Born Northeasterly corner thereof; thence North 16° 45" East along the Southeasterly line of land conveyed to George B. Holbrook by Deed dated February 12, 1931, and recorded in Volume 4115, Page 168 of Cuyahoga County Records, 104.365 feet; thence North 89° 52' 50" West, 429.61 feet to the center line of a proposed roadway, 30 feet wide; said line also being parallel to and distant Northerly 100 feet by rectangular measurement from the Northerly line of land so conveyed to the Born Steel Range and Manufacturing Company, as aforesaid; thence South 8° 43' 12" West 101.37 feet to a point in said Northerly line of land so conveyed to the Born Steel Range and Manufacturing Company, as aforesaid; thence South 0° 11' 10" West, 160.917 feet along the center line of a proposed roadway, 30 feet wide, to the principal place of beginning, be the same more or less, but subject to all legal highways. Excluding, however, from above described premises the Easterly portion of a parcel of land 16 feet wide, conveyed to the Cleveland Belt & Terminal Railroad Company by deed dated June 24, 1898, and recorded in Volume 692, Page 386 of Cuyahoga County Records.

1. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

V. REIMBURSEMENT OF RESPONSE COSTS

10. Within 30 days of the effective date of this Agreement, the Settling Parties shall pay to the EPA Hazardous Substance Superfund in reimbursement of Past Response Costs, as follows: DeSantis Paint Manufacturing Company shall pay \$500.00; Elmer Freiberg shall pay \$500.00; David Tvert shall pay \$10,000.00; and Cuyahoga Chemical Company shall pay \$100.00. Further, Elmer Freiberg and David Tvert agree that the proceeds from the sale of the Site shall be paid to EPA. Upon receipt of the proceeds, EPA shall remove the Section 107(l) lien that it placed on the Site. City Barrel & Drum Company shall pay to the EPA Hazardous, Substance Superfund the total sum of \$5,000 in the following manner:

(a) Within 30 days of the effective date of this Agreement, City Barrel and Drum Company shall pay \$1,667;

(b) on the first anniversary date of the first payment, City Barrel and Drum Company shall pay \$1,667 plus interest on the unpaid balance of \$3,333;

(c) on the second anniversary date of the first payment, City Barrel and Drum Company shall pay its final installment payment of \$1,666 plus interest on the unpaid balance of \$1,666.

11. Payments shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." Each check shall reference the name and address of the party making payment, the Site name, the EPA Region and Site/Spill ID Number 0526, and the EPA docket number for this action, and shall be sent to:

EPA Superfund
U.S. EPA - Region 5
P.O. Box 70753
Chicago, Illinois 60673

12. At the time of payment, each Settling Party shall send notice that such payment has been made to:

Peter Felitti
Assistant Regional Counsel
U.S. EPA
77 W. Jackson Blvd. (C-14J)
Chicago, IL 60604-3590

VI. FAILURE TO COMPLY WITH AGREEMENT

13. In the event that any payment required by Paragraph 10 is not made when due, Interest shall continue to accrue on the unpaid balance through the date of payment.

14. If any amounts due to EPA under Paragraph 10 are not paid by the required date, Settling Parties shall pay to EPA, as

a stipulated penalty, in addition to the Interest required by Paragraph 13, \$500.00 per violation per day that such payment is late.

15. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made in accordance with Paragraphs 11 and 12.

16. Penalties shall accrue as provided above regardless of whether EPA has notified the Settling Parties of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after performance is due, or the day a violation occurs, and shall continue to accrue through the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

17. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of Settling Parties' failure to comply with the requirements of this Agreement, any Settling Party who fails or refuses to comply with any term or condition of this Agreement shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Agreement, Settling Parties shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

18. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement.

VII. COVENANT NOT TO SUE BY EPA

19. Except as specifically provided in Paragraph 20 (Reservations of Rights by EPA), EPA covenants not to sue Settling Parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Reimbursement of Response Costs) and Section VI, Paragraphs 13 (Interest on Late Payments) and 14 (Stipulated Penalty for Late Payment). This covenant not to sue is conditioned upon the satisfactory performance by Settling Parties of their obligations under this Agreement. This covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by each Settling Party. If

the Financial Information is subsequently determined by EPA to be false or, in any material respect, inaccurate, that Settling Party shall forfeit all payments made pursuant to this Agreement and the covenant not to sue shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose EPA's right to pursue any other causes of action arising from a Settling Party's false or materially inaccurate information. This covenant not to sue extends only to Settling Parties and does not extend to any other person.

VIII. RESERVATIONS OF RIGHTS BY EPA

20. The covenant not to sue by EPA set forth in Paragraph 19 does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Parties with respect to all other matters, including but not limited to:

a. liability for failure of Settling Parties to meet a requirement of this Agreement;

b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;

c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;

d. criminal liability; and

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

21. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Agreement.

IX. COVENANT NOT TO SUE BY SETTLING PARTIES

22. Settling Parties agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of

CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of the response actions at the Site for which the Past Response Costs were incurred; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

23. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

24. Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. EPA and Settling Parties each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

25. EPA and Settling Parties agree that the actions undertaken by Settling Parties in accordance with this Agreement do not constitute an admission of any liability by any Settling Party. Settling Parties do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section II of this Agreement.

26. The Parties agree that Settling Parties are entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or by any other person.

27. Each Settling Party agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Party also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Agreement, it will notify EPA in writing within 10 days of

service of the complaint or claim upon it. In addition, each Settling Party shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

28. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Parties shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Paragraph 19.

XI. RETENTION OF RECORDS

29. Until five years after the effective date of this Agreement, each Settling Party shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary.

30. After the conclusion of the document retention period in the preceding paragraph, Settling Parties shall notify EPA at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA, Settling Parties shall deliver any such records or documents to EPA. Settling Parties may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege, they shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports, or other information created or generated pursuant to the requirements of this or any other judicial or administrative settlement with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to EPA in redacted form to mask the privileged information only. Settling Parties shall retain all records and documents that they claim to be

privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Parties' favor.

31. By signing this Agreement, each Settling Party certifies individually that, to the best of its knowledge and belief, it has:

a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant or contaminant at or in connection with the Site;

b. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site, after notification of potential liability or the filing of a suit against the Settling Party regarding the Site; and

c. fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e).

XII. NOTICES AND SUBMISSIONS

32. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Parties.

As to EPA:

Peter Felitti
U.S. EPA
77 W. Jackson Blvd. (C-14J)
Chicago, IL 60604-3590

As to Settling Parties:

For David Tvert and Elmer Freiberg:

Michael McMahon

McMahon, DeGulis, Hoffman & Blumenthal
The Caxton Building, Suite 650
812 Huron Road
Cleveland, Ohio 44115-1126

For Cuyahoga Chemical Company

Keven Eiber
Brouse & McDowell
1001 Lakeside Avenue
Cleveland, Ohio 44104-1151

For City Barrel & Drum Company

Sanford Gerard
2881 East 91st Street
Cleveland, Ohio 44124

For DeSantis Paint Manufacturing Company

Virginia DeSantis, President
DeSantis Paint Manufacturing Company
4101 East 116th Street
Cleveland, Ohio 44105

XIII. INTEGRATION

33. This Agreement and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement.

XIV. PUBLIC COMMENT

34. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

XV. ATTORNEY GENERAL APPROVAL

35. The Attorney General or his designee has approved the settlement embodied in this Agreement in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).

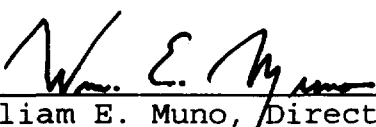
XVI. EFFECTIVE DATE

36. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 34 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Agreement.

IT IS SO AGREED:

U.S. Environmental Protection Agency

By: _____


William E. Muno, Director
Superfund Division, Region 5

Date

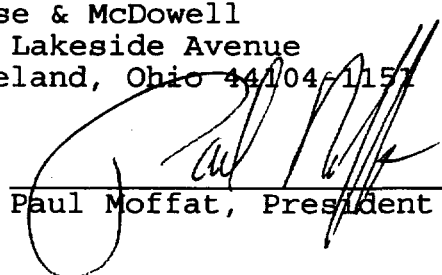
8/5/03

THE UNDERSIGNED SETTLING PARTY enters into this Agreement in the matter of Ohio Drum Superfund Site:

FOR SETTLING PARTY:

Cuyahoga Chemical Company
c/o Keven Eiber
Brouse & McDowell
1001 Lakeside Avenue
Cleveland, Ohio 44104-1151

By:



Paul Moffat, President

6/24/03

Date

FOR SETTLING PARTY:

DeSantis Paint Manufacturing Company
4101 East 116th Street
Cleveland, Ohio 44105

By:

Virginia DeSantis
Virginia DeSantis, President

6-6-03
Date

FOR SETTLING PARTY:

Elmer Freiberg
c/o Michael McMahon
McMahon, DeGulis, Hoffman & Blumenthal
The Caxton Building, Suite 650
812 Huron Road
Cleveland, Ohio 44115-1126

By:

Elmer Freiberg
Elmer Freiberg

Date

7/2/03

FOR SETTling PARTY:

David Tvert
c/o Michael McMahon
McMahon, DeGulis, Hoffman & Blumenthal
The Caxton Building, Suite 650
812 Huron Road
Cleveland, Ohio 44115-1126

By:

David Tvert

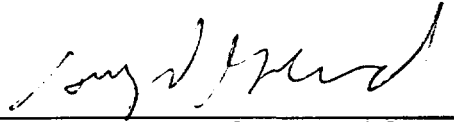
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Date

FOR SETTLING PARTY:

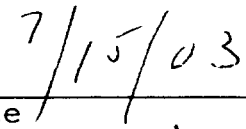
City Barrel & Drum Company
2881 East 91st Street
Cleveland, Ohio 44124

By:



Sanford Gerard, President

Date



7/15/03